

JUL 30 1979

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-6 (Sub-No. 51F)

BURLINGTON NORTHERN INC. ABANDONMENT AND DISCONTINUANCE
OF SERVICE IN MINERAL COUNTY, MONTANA, AND SHOSHONE
COUNTY, IDAHO

FINANCE DOCKET No. 28759

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY AND UNION
PACIFIC RAILROAD COMPANY-ACQUISITION AND OPERATION-OVER
BURLINGTON NORTHERN INC. IN SHOSHONE COUNTY, IDAHO

REC'D, LAW DEPT.

AUG 1 1979

BN ST, PAUL

Decided: June 15, 1979

On May 18, 1978, Burlington Northern Inc. (BN), filed an application in Docket No. AB-6 (Sub-No. 51F) for a certificate of public convenience and necessity permitting abandonment of its line of railroad extending from milepost 19.57 near Haugan, Montana, to milepost 49.07 near Mullan, Idaho, and discontinuance of service over its line extending from milepost 49.07 near Mullan to milepost 58.61 near Wallace, Idaho, a total distance of 39.04 miles. Although termed "discontinuance", the latter part of the application in actuality also contemplates abandonment, as explained below. The proposed abandonment is governed by 49 U.S.C. §§10903-06 and by the Commission's regulations appearing in 49 C.F.R. Part 1121 (1978).

BN served, posted, and published notice of its application in accordance with the requirements set forth in the abandonment regulations. Silver Dollar Mining Company (Silver Dollar) filed a petition to investigate the proposed abandonment, and various governmental bodies, labor organizations, and concerned citizens and groups submitted comments in opposition. By decision dated July 11, 1978, the Commission instituted an investigation into the proposal. By decision dated August 11, 1978, the Commission granted a petition for leave to intervene filed by the Idaho Public Utilities Commission.

On May 10, 1978, the Oregon-Washington Railroad & Navigation Company (OW) and the Union Pacific Railroad Company (UP) filed an application in Finance Docket No. 28759 for a certificate of public convenience and necessity permitting the acquisition and operation of the BN line lying between Mullan and Wallace and now pending for abandonment in Docket No. AB-6 (Sub-No. 51F). The proposed acquisition and operation is governed by 49 U.S.C. §10901 and the Commission's regulations appearing in 49 C.F.R. Part 1120 (1978). By decision dated October 4, 1978, the Commission consolidated the proceedings in Docket No. AB-6 (Sub-No. 51F) and Finance Docket No. 28759 for disposition on a common record.

The Commission set the matters for handling under the modified procedure by a decision dated November 28, 1978. In accordance with the decision, BN filed verified statements in support of the application. Mr. Orville L. Daniels, Forest Supervisor, Lolo National Forest, and the Idaho Transportation Department (ITD) submitted responsive statements, and Silver Dollar submitted a statement in

opposition. Subsequently, BN, singly, and OW and UP, jointly, filed reply statements. On May 14, 1979, Silver Dollar submitted a supplemental verified statement in protest, and on May 17, 1979, BN moved to strike that pleading.

BN indicates, in its application for abandonment, that the line from Haugan to Mullan traverses a mountainous area with adverse weather and sparse population, and that the minimal traffic generated by the line does not justify snow removal, maintenance, and service costs. The Haugan to Mullan segment neither originated nor terminated any traffic in the previous two years, except a cement shipment to Saltese, Montana. Regarding the line from Mullan to Wallace, BN states that substantial efficiencies would result from conveyance to UP, without reduction in service. Shipments forwarded, received, and interchanged on the entire Haugan to Wallace trackage totalled 620, 860, and 575 carloads in the years 1975, 1976, and 1977, respectively. The railroad sustained operating losses of \$120,971, \$56,731, and \$93,274 during those years.

In initial verified statements, BN asserts that the present volume of traffic cannot support operating and maintenance costs, and that no prospects exist for a significant growth of sustained traffic. Alternate motor service and the UP acquisition, it contends, would preclude adverse effects to shippers on the line. BN notes that protestant Silver Dollar, located at Wallace, did not use the involved line in the years 1975 through 1978. The railroad maintains that there is no industry between Haugan and Mullan, nor any potential industrial development in the area. Only the stations at Mullan and Wallace forwarded or received traffic in 1977 and the first nine months of 1978, BN discloses, and the 442 carloads shipped resulted in \$122,693 in losses for that period.

In their application for acquisition and operation, OW and UP reveal that OW would own and UP would operate the Mullan to Wallace line. To serve Mullan and Wallace, BN must operate over Lookout Pass, which receives heavy snow and adverse weather making winter operations difficult. OW and UP point out that they can serve the segment without those problems. In the return to questionnaire, the applicants aver that the acquisition and operation would permit UP to obtain additional traffic presently interchanged with or moving via BN. They anticipate that the line would be profitable in itself and would contribute to the profitability of their existing line which terminates at Wallace.

Pursuant to an agreement entered May 22, 1978, BN would convey the Mullan to Wallace line by quit claim deed for \$1. UP and BN would maintain and keep open all joint rates and through routes under existing tariffs and would establish such joint rates and through routes as necessary to ensure that no industries currently on the track would suffer loss of existing traffic or transportation privileges. Any tariff amendments necessary to maintain existing traffic and transportation privileges would be published prior to UP's assumption of service.

Mr. Daniels recommends retention of the entire right-of-way as a public transportation system under the adminis-

tration of the Forest Service. He believes that most of the right-of-way is held under a qualified fee and would revert to the United States upon cessation of use for rail transportation.

ITD finds no economic need for retaining the Haugan to Mullan line and supports both of the instant applications provided UP continues service on the Mullan to Wallace segment and the Commission imposes a condition for rate protection. An evaluation of the line prepared by ITD concludes that the trackage does not have a potential for economic viability and is not essential to the state or regional rail network, and that abandonment would have minimal economic and community impact and would cause only small changes in energy consumption and environmental factors.

Protestant Silver Dollar represents that, although it does not currently use the BN line, it periodically reconsiders such use. It points out that the BN line provides rail access to the east, and UP to the west, and that no lines run north or south out of the area. The protestant argues that the Commission should analyze any alleged losses not within the time frame of the past few years but in the perspective of the line's entire history, including about 80 years of profit, and with regard to the area's potential. Although recognizing that the future of the area and the need for the line are hazy, Silver Dollar reasons that possible prospective use by mining and timber interests mandate maintenance and operation of the line for an additional 25 years, permitting a complete determination of development in the area and a full analyzation of BN's losses in a true historical setting. The protestant questions the nature and extent of the railroad's losses, disputing inclusion of expenses for the Mullan to Wallace segment and overhead and off-branch costs and alleging possible duplication of expenses. It calls for an independent financial audit or a substantiation of each item. Declaring that BN has a duty, derived from vast federal land grants and great government benefits received in the past, to provide service in the area, Silver Dollar states that the carrier should not escape its obligations by abandoning the line on the basis of recent losses. Silver Dollar further contends that following abandonment the area would be left without rail service for significant periods because the UP line, which provides the sole western rail access, is prone to flooding. The protestant requests an oral hearing to allow the presentation of new testimony in a number of enumerated areas.

BN replies that if the applications are granted, rates and routes would be no less favorable than those currently published, and it raises no objection to imposition of the rate conditions proposed by ITD. Silver Dollar has not used the line since 1974, the railroad notes, and it considers irrelevant the protestant's comments on the alleged profitability of the line in the past 80 years. The applicant avers that within the relevant past, currently, and within the foreseeable future the line would operate at a loss. Noting that the protestant has not offered to use the trackage, BN maintains that no company should operate an asset at a loss upon a mere whim that the facility may become useful or profitable at some time in the future. The

railroad also asserts that it prepared all financial and statistical data in accordance with the Commission's abandonment regulations, that allocation between the two segments is impractical since the Mullan to Wallace trackage generated nearly all of the traffic, that it developed overhead and off-branch costs as specified in the regulations, and that the reported expenses do not involve any duplications.

In their reply, OW and UP object to ITD's request for rate conditions and argue that the agency's proposal is completely inappropriate. OW and UP also refute Silver Dollar's contentions that the area could be without rail service for a significant periods because of flooding. They indicate that UP's Wallace branch is no more subject to service interruption than numerous other rail lines in the area, and has experienced only two major interruptions in the past 10 years. They represent that the history of prompt restoration demonstrates UP's commitment to maintain service in the area.

MOTION TO STRIKE

In its supplemental verified statement, Silver Dollar contends that the Commission should defer consideration of BN's abandonment proposal pending resolution of the operating future of the western lines operated by Stanley E. G. Hillman, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company (MILW). Moving to strike, BN states that arguments are not relevant to the instant proceedings and not allowed absent prior approval, and that acceptance would cause unnecessary delay.

Rule 49 of the Commission's General Rules of Practice, 49 C.F.R. §1100.49, provides that the parties shall make no further reply after the applicant submits its response to opposition statements, except by Commission permission. Silver Dollar's supplemental statement raises no matters germane to the instant abandonment proposal, and, if accepted, would necessitate affording the applicants an opportunity to reply. We are aware of the possible cessation of MILW service in the region, however, and note that such circumstance would not affect the communities and commerce involved in these proceedings. We shall grant BN's motion to strike.

DISCUSSION AND CONCLUSIONS

We shall deny Silver Dollar's request for an oral hearing. The modified procedure affords a sufficient opportunity to resolve the issues raised by the instant proceedings.

As noted above, BN's application, although styled as one for abandonment of part and discontinuance of part of the Mullan to Wallace line, actually contemplates abandonment of the entire trackage. The application in Finance Book No. 28759, filed under section 1(18) of the Interstate Commerce Act (recodified in pertinent part as 49 U.S.C. §10903), demonstrates that BN intends to abandon rather than discontinue the Mullan to Wallace segment. Mere discontinuance

of service between Mullan and Wallace would not change the rail character of that segment, and OW, being a carrier, would need authority under 49 U.S.C. §11344 to acquire the line as rail property. Upon abandonment, however, the line would no longer be rail property and OW could immediately acquire the line under 49 U.S.C. §10901. Compare Tennessee Central Ry. Co. Abandonment, 334 I.C.C. 235 (1969) and Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (1964).

We must weigh the present and future need for the Haugan to Wallace line against the burden that continued operation would impose on BN and on interstate commerce. We note that no shipper presently using the line has protested, and that ITD gives qualified support to abandonment, having found the line neither viable nor essential. If we grant the acquisition application, no shipper that has recently used BN's service would be without access to rail transportation. Silver Dollar's contentions that UP service is susceptible to frequent interruption and that area should retain access from the east via the BN line are unsubstantiated. We conclude that UP is capable of providing adequate and efficient rail service on the Mullan to Wallace segment.

Contrasted with the lack of adverse impact on users are the heavy operating losses which BN has suffered in recent years in providing service on the line. We confirm that BN has prepared its cost and revenue exhibits in accordance with the Commission's abandonment regulations, that the data accurately reflect recent operating results, and that Silver Dollar's contrary assertions are without merit. Further, the protestant's indefinite allegations of long-past profitability do not rise to a sufficient level of either relevance or probative value to warrant serious consideration. In the absence of identifiable harm to shippers (assuming acquisition and continued operation of the Mullan to Wallace segment), without demonstrable prospects for increased revenue generating traffic, and considering the burdensome cost of continued operation, we believe that the record amply justifies abandonment.

ITD requests a condition requiring maintenance of the existing basis of rates for commodities which presently move on the Haugan to Wallace line but, after abandonment, would follow a more circuitous routing. The agency cites our decision in AB-36 (Sub-No. 6F), Oregon S. L. R. Co. Abandonment and Abandonment of Service by Union P. R. Co. (not printed), decided August 21, 1978, as supporting precedent. The cited proceeding involved different circumstances than those presented here, however, primarily that the abandoning railroads, to whose operations the condition would attach, agreed to it. In the instant proceedings, BN would accept the condition, but UP, which would bear the primary burden of its application, objects. The sought condition, which would entail the unjustified imposition upon one carrier of an artificial rate computation based upon an inoperative line of another carrier, is inappropriate to these proceedings. Compare Seaboard Coast Line R. Co.-Abandonment, 360 I.C.C. 123, 136 (1979).

In an environmental threshold assessment survey, the Commission's Section of Energy and Environment concluded that the proposed abandonment would not significantly affect the quality of the human environment, and that the right-of-way between Haugan and Mullan is suitable for public use. We shall impose a condition allowing interested persons the first opportunity to acquire the property for public use. Should the Forest Service desire to acquire the right-of-way, the period of holding open will permit time for negotiations. We must leave to BN, the Forest Service, and other aspiring parties any questions regarding ultimate title to the right-of-way.

In Docket No. AB-6 (Sub-No. 51F), we find that, subject to the same conditions for protection of employees as set forth in Oregon Short Line R. Co.-Abandonment-Goshen, 360 I.C.C. 91 (1979) the present and future public convenience and necessity permit abandonment by BN of its described line of railroad extending between Haugan, Montana, and Wallace, Idaho, provided (a) that OW acquire and UP operate that portion of the line extending between Mullan and Wallace, Idaho, as authorized in Finance Docket No. 28759, and (b) that BN shall not sell, lease, exchange, or otherwise dispose of the right-of-way underlying the track, nor remove any of the railroad structure, except rails and ties, between Haugan and Mullan for a period of 120 days following the issuance of the certificate to permit any state or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of the right-of-way.

In Finance Docket No. 28759, we certify that the present and future public convenience and necessity require the acquisition by OW and the operation by UP of the described line of railroad extending between Mullan and Wallace, Idaho. We find that the transaction will not adversely affect employees, that its terms are just and reasonable, and that it is consistent with the public interest.

This decision will not significantly affect the quality of the human environment or the level of energy consumption.

It is ordered:

In the event any person or government entity is considering an offer of financial assistance to enable the rail service involved to be continued, it should comply with 49 C.F.R. §1121.38(b) (1978). Within 10 days after receiving appropriate notification that an offer of financial assistance is being considered, the railroad shall comply with the informational requirements of 49 C.F.R. §1121.38(e) (1978).

All correspondence to the Commission with respect to offers of financial assistance for the continued operation or acquisition of the line shall contain an appropriate reference to this proceeding, and the following notation shall be typed in boldface on the lower left corner of envelopes containing such correspondence: "Section of Finance AB-RSCP".

Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued. The railroad shall not effect abandonment or discontinuance of service prior to the effective date of the certificate of abandonment.

Finance Docket No. 28767

Within 15 days after consummation and commencement of operations, Oregon-Washington Railroad & Navigation Company and Union Pacific Railroad Company shall give the Commission written notice of the dates of consummation and of commencement of operations. Further, within 60 days after consummation, Oregon-Washington Railroad & Navigation Company shall submit to the Commission two copies of the journal entries required to record the transaction.

When Union Pacific Railroad Company establishes rates and charges applicable to the line which it will operate, it shall refer to this certificate and decision by docket number and date of decision.

General Provisions

The motion by Burlington Northern Inc. to strike the supplemental verified statement of Silver Dollar Mining Company is granted.

The request by Silver Dollar Mining Company for oral hearing is denied.

This certificate and decision shall be effective 30 days from the date it is served.

If the authority granted herein is not exercised within one year from the effective date, it shall be of no further force and effect.

The strict time constraints imposed by 49 U.S.C. §10327 make it necessary to expedite all proceedings concerning rail carriers. Accordingly, requests for extensions of time for filing appeals and responses will be denied absent a showing of extraordinary circumstances. An appeal to this certificate and decision must be filed within 20 days after service or within such further period (not to exceed 20 days) as may be authorized.

By the Commission, Review Board Number 5, Members Krock, Pohost and Taylor. (Board Member Taylor did not participate)

AGATHA L. MERGENOVICH,
Secretary